IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JAIPUR BENCH, JAIPUR

S.B. Civil Misc. Appeal No.198/2001

Prabhu Lal Soni V/s State

Date of Judgment : 21st August, 2006

HON'BLE MR. JUSTICE R.S. CHAUHAN

Mr. Tripurari Sharma, for the appellant.
Mr. S.N. Gupta, Dy. G.A., for the State.

The plaintiff-appellant has challenged the order dated 20.12.2000 passed by the Additional District Judge, No.4, Kota whereby the learned Judge has accepted the appeal, set aside the judgment and decree dated 22.5.1996 passed by the Additional Civil Judge (Junior Division) No.1, (North), Kota and has remanded the case back for decision in the suit afresh.

The brief facts of the case are that the plaintiff-appellant was working as Lower Division Clerk (henceforth to be referred to as 'the L.D.C.', for short) in Drainage Division-II, (LDC), Chambal Command, Bundi. The appellant was on leave from 19.11.1974 and the Department duly accepted the said leave. On 19.03.1975 the appellant received an order signed by Shri Sadhu Ram, Executive

Engineer whereby the appellant was suspended on the ground that a criminal offence has been registered against the appellant and is under investigation. Vide order dated 5.7.1975, the charge-sheet was issued to the appellant by Shri Sadhu Ram wherein four charges were leveled against him. Firstly, willful absence from the duty; secondly, misbehavior and in subordination; thirdly, mishandling of Shri Shamsher Singh, Superintending Engineer and fourthly, attempt to murder Shri Shamsher Singh, Superintending Engineer. According to the charge-sheet dated 18.3.1975, Shri Shamsher Singh had lodged the report at Police Station Bheemganj Mandi against the appellant and his brother regarding an incident, which allegedly took place on 17.3.1975. The police registered a case for offence under Section 307, 336 and 448 I.P.C. After the investigation, the police also submitted a charge-sheet. However, after the trial, vide judgment dated 25.11.1975, the appellant was acquitted. The State had filed an appeal against the acquittal order. However, the appellate Court also dismissed the appeal. Meanwhile, the appellant replied to the charge-sheet. However, the inquiry could not be started. Therefore, Shri Shamsher Singh issued various letters appointing different inquiry officers. Ultimately, Shri Shamsher Singh, the person allegedly

assaulted by the appellant appointed Shri Sadhu Ram as the inquiry officer vide his order dated 22.12.1975. Interestingly, Shri Singh himself was to be a witness in the departmental inquiry as charge Nos.3 and 4 related to him. After completion of the inquiry, Shri Sadhu Ram submitted his inquiry report to Shri Shamsher Singh. Shri Shamsher Singh gave a notice to the appellant before inflicting the proposed punishment enclosing therewith the copy of the inquiry report. The appellant replied to the said notice on 6.8.1976. He also raised the preliminary objection that the Superintending Engineer, Shri Shamsher Singh, could not be the disciplinary authority as he was interested in the case himself. Notwithstanding this objection, vide order dated 27.9.1976, Shri Shamsher Singh dismissed the appellant from the service. Since the appellant was aggrieved by the dismissal order, he filed a departmental appeal before the Appellate authority. Vide order dated 7.10.1978, the Appellate authority partly allowed the appeal and converted the order of dismissal into an order of termination.

The appellant filed a civil suit for declaration wherein he challenged the entire departmental inquiry on the ground of bias and

on the ground of malafide intention of the inquiry officer and the disciplinary authority. In the suit, the appellant sought the setting aside of the orders dated 27.9.1976 and 7.10.1978. He further sought reinstatement in the service with backwages and all consequential benefits and difference of salary of suspension period. The respondent-defendant filed their written statement wherein they denied the averments made in the plaint. The learned trial Court framed four issues. After hearing both the parties, the trial Court decided the issue No.1 in favour of the plaintiff-appellant and held that the inquiry officer did not hold an inquiry in a fair manner. Likewise, issues No.2, 3 and 4 were also decided in favour of the plaintiff-appellant. Hence, vide judgment dated 22.05.1996, the trial Court passed a decree in favour of the appellant and set aside the order dated 27.9.1976 and the order dated 7.10.1978. It further decreed the reinstatement of the appellant with all consequential benefits and difference of suspension allowance. The defendant-respondent preferred a first appeal. The appellate Court came to the conclusion that the trial Court has not framed two issues: whether there was any violation of principles of natural justice or not? And whether due opportunity of hearing was given to the appellant or not?

While setting aside the finding on issues No.1, vide judgment dated 20.12.2000, the appellate Court remanded the case back to the trial court for re-deciding the case. Since the appellant is aggrieved by the remand of the case, he has filed this appeal before this court.

Mr. Tripurari Sharma, the learned counsel for the appellant, has argued that the ample powers have been given to the appellate court under Section 107 of the Civil Procedure Code (henceforth to be referred to as ‘the Code’, for short) and under Order 41 Rules 24 and 25 of the Code for the appellate Court to re-settle the issues, to take the additional evidence and to decide the case itself. Hence, the appellate Court should not have remanded the case back, but in fact should have decided the case itself. Moreover, the appellant is facing a departmental inquiry since 1975, has been involved in a civil litigation since 1989 and is now, after a lapse of twenty-five years, he has been directed to again go back to the trial Court by the learned appellate Court. Thus, even after a lapse of thirty-one years as of today, the appellant is seeking justice. Furthermore, the violation of the principles of natural justice was writ large in the instant case. There was sufficient evidence on the face of the record to prove the

violation of principles of natural justice. Thus, the appellate court could have decided this issue at the appellate stage. Likewise, there was sufficient evidence for the decision of the second issue framed by the appellate court. Hence, there was no need to send the case back to the trial court. But without appreciating the facts, which were so obvious on the face of record, in a routine and mechanical manner, the case has been remanded for further trial. Therefore, according to the learned counsel, the judgment dated 20.12.2000 deserves to be quashed and set aside.

On the other hand, Mr. S.N. Gupta, Deputy Government Advocate, the learned counsel for the State, has argued that the power to remand a case back to the trial Court is a discretionary power. Since the trial Court had not framed the issue of violation of the principles of natural justice, it was imperative that the case be sent back to the trial Court for a fresh decision. Hence, he has supported the impugned judgment.

We have heard both the learned counsels for the parties and have perused the impugned judgment.

The power to remand a case is contained in Section 107 of the Code as well in Order 41 Rules 23 to 26-A of the Code. The power to record additional evidence at the appellate stage is contained in Order 41 Rules 27, 28 and 29 of the Code. These powers are quoted below.

Section 107 of the Code deals with the powers of the Appellate Court as under:

> 107. **Powers of appellate Court** – (1) Subject to such conditions and limitations as may be prescribed, as appellate Court shall have power -
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> (a) to determine case finally;
> (b) to remand a case;
> (c) to frame issues and refer them for trial;
> (d) to take additional evidence or to require such evidence to be taken.
>
> (2) Subject as aforesaid, the appellate Court shall have the same powers and shall perform as nearly as may be same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein.

A holistic reading of these provisions clearly reveals that under Section 107 of the Code, the appellate Court has the power to frame

issues, to take additional evidence and to determine the case finally. Moreover, according to Section 107(2) of the Code, the appellant Court has the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction. Thus, according to Section 107 of the Code, it is not necessary for the appellate Court to automatically remand a case back to the trial Court. Sufficient powers have been bestowed on the appellate Court to re-frame the issues, to take additional evidence and to determine the case finally. Order 41, Rules 23 to 29 of the Code elaborate the powers contained in Section 107 of the Code.

Order 41 Rules 23 to 26A of the Code deals with the power of remand. Order 41 Rule 23 reads as under:-

> *23. **Remand of case by Appellate Court** – Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reserved in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, with directions to readmit the suit under its original number in the register of civil suits, and proceed to determine*

the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand.

23-A. ***Remand in other cases*** *– Where the Court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reserved in appeal and a retrial is considered necessary, the Appellate Court shall have the same powers as it has under rule 23.*

24. ***Where evidence on record sufficient, Appellate Court may determine case finally*** *– Where the evidence upon the record is sufficient to enable the Appellate Court to pronounce judgment, the Appellate Court may, after resetting the issues, if necessary, finally determine the suit, notwithstanding that the judgment of the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the Appellate Court proceeds.*

25. ***Where Appellate Court may frame issues and refer them for trial to Court whose decree appealed from*** *– Where the Court from whose decree the appeal is preferred has committed to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred and in such case shall direct such Court to take the additional evidence required; and such Court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereupon and the reasons therefore [within such time as may be fixed by the Appellate Court or extended by it from time to time].*

26. ***Findings and evidence to be put on record – Objections to finding*** *– (1) Such evidence and findings shall form part of the record in the suit; and either party may, within a time to be fixed by the Appellate Court, present a memorandum of objections to any finding.*

*(2) **Determine of appeal** – After the expiration of the period so fixed for presenting such memorandum the Appellate Court shall proceed to determine the appeal.*

*26-A. **Order of remand to mention date of next hearing** – Where the Appellate Court remands a case under rule 23 or rule 23-A, or frames issues and refers them for trial under rule 25, it shall fix a date for the appearance of the parties before the Court from whose decree the appeal was preferred for the purpose of receiving the directions of that Court as to further proceedings in the suit.*

A conjoint reading of these provisions would clearly reveal that Order 41 Rule 23 of the Code deals with a case where the Trial Court has disposed of a suit upon a preliminary point and the decree is reversed in appeal. The Appellate Court may, if it thinks fit, by order remand the case, and may further direct the issues, which shall be tried in the case so remanded. The Appellate Court may further direct the Trial Court to readmit the suit under its original number in the register of civil suits. It may also direct the Trial Court to determine the suit and also declare that the evidence, if any, recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand. Order 41 Rule 23-A of the Code grants the same power as under Order 41 Rule 23 of the Code, when the case is finally disposed of and the decree is reversed in appeal and a

retrial is considered necessary.

Considering the fact that the power under Order 41 Rules 23 and 23-A of the Code is vast in nature, the power should be exercised sparingly and in the rarest of the rare case. As a denovo trial, especially under Order 41 Rule 23-A of the Code, would imply the trial to start all over again from the initial stage. Since the civil trials are time consuming, since a denovo trial would again take the parties through the rigors of a civil trial, therefore, such a power should be resorted in the rarest of the rare cases.

Once, the case has come up to the appellate stage, according to Rule 24 of the Code, if the evidence upon the record is sufficient to enable the Appellate Court to pronounce the judgment, the Appellate Court may, after resettling the issues, if necessary, finally determine the suit. Hence, under Rule 24 of the Code, there is no necessity for the Court to remand the case back to the Trial Court. It can exercise the power, take additional evidence under Rule 27 of the Code for the resettled issues and decide the case finally itself.

According to Rule 25 of the Code, the Court may frame certain issues and refer them for trial to the Trial Court, in case the Trial Court has omitted to frame or try any issue or to determine any question of fact, which appears to the Appellate Court to be essential for just decision of the suit. The Appellate Court shall direct the Trial Court to take additional evidence as required and to return the evidence so recorded back to the Trial Court within the time frame fixed by the Appellate Court. Upon receiving such evidence under Rule 26(2) of the Code, the Appellate Court shall proceed to determine the appeal.

A bare perusal of Rules 24 and 25 of the Code clearly reveals that the Appellate Court should endeavour to decide the case at the appellate stage itself. However, in rare cases for just decision of the case, it may remand the case back to the Trial Court for recording of evidence on particular issue framed by it. But such recording should be done within the time frame fixed by the Appellate Court. Moreover, the evidence so recorded should be sent back to the Appellate Court for final decision of the appeal. The purpose behind the Rules is not to initiate de novo trial. The purpose is also not to prolong the dispute

between the parties. Since the Judiciary must endeavour to decide the dispute as soon as possible, the Appellate Court is expected to decide this case at the appellate stage itself. Therefore, the tendency to remand the case in toto after setting aside the judgment of the Trial Court and the tendency to direct a denovo trial is against the tenor of law. The Appellate Court is expected to exercise its power within the confines to Rules 23 to 26-A of the Code. Ample powers have been given to the Appellate Court under Order 41, Rules, 27, 28 and 29 of the Code to take additional evidence by the Appellate Court and to decide the issues reframed by it. Since the Trial Courts are the most overburden Courts in the judicial hierarchy, the Appellate Court should refrain from remanding the case in toto in a routine manner. What can be done at the appellate stage, need not be remanded back to the Trial Courts. After all, the buck has to stop somewhere. The poor litigant cannot be treated as a shuttlecock and forced to run from pillar to post. The litigant expects the judiciary to decide its case at the earliest. The litigant neither has the financial means, nor the energy to go on a roller-coaster ride of litigations. The judiciary has to be sensitive to the financial condition and to expectation of the litigant. To prolong a dispute endlessly is not only a disservice to the

litigant, but it is an injustice to him. Therefore, this trend of remanding the case back to the Trial Court in a mechanical and routine manner has to stop. The learned District Judges, who are experienced and knowledgeable, are expected to do their duty by the litigant.

In the present case, there was ample power with the learned appellate Court to decide the case finally at the appellate stage itself. There was also ample evidence to prove violation of the principles of natural justice. One of the principles of natural justice is that a person cannot be a judge in his own cause. For, there is a likelihood of bias in the mind of such a person who sits as a judge in his own cause. In the present case, the charges related to the alleged assault committed by the appellant on Shri Shamsher Singh, Superintending Engineer. Shri Sadhu Ram was appointed as an inquiry officer by Shri Shamsher Singh. After completion of the departmental inquiry, the inquiry officer sent his inquiry report to Shri Shamsher Singh. It is Shri Shamsher Singh who has rejected the appellant's reply to the second show cause notice and has passed the order dismissing the appellant from service. Hence, Shri Shamsher Singh was sitting as a judge in his own cause. He was a witness in the departmental inquiry,

he was the adjudicating authority as the disciplinary authority, and he is the person who has passed the termination order dated 27.9.1976. Thus, the likelihood of bias is obvious from the facts themselves. Therefore, the violation of the principles of natural justice is writ large in the present case. The appellate Court could have easily decided this issue. But, the appellate Court did not invoke its power under Section 107 of the Code and did not decide the case finally. There was no need for the appellate Court to remand the case back to the trial Court as sufficient evidence did exist on the face of record. Needlessly, a poor L.D.C. has been forced to run from pillar to post, from one court to another court seeking justice for the last 31 years. This is, indeed, a shocking state of affair if the life of a poor citizen can be taken so lightly. It is not only the primary duty of the State, but also the duty of the judiciary to improve the condition of the people by settling the disputes in a short time. After all, justice delayed is justice denied. In the instant case, the justice has eluded the appellant for the last thirty-one years.

Hence, we have no option but to quash and set aside the order dated 20.12.2000 and to uphold the judgment and decree dated

22.05.1996. The State is directed to implement the judgment and decree dated 22.05.1996 within a period of two months from the date of receipt of a certified copy of this order.

With these observations, this appeal is allowed.

(R.S. CHAUHAN)J.

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